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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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10 Dante Shon Gordon,) No. CV 11-8153-PCT-RCB (JFM)

11 Plaintiff,) **ORDER**

12 vs.)

13 Charles Ryan, et al.,)

14 Defendants.)

15 _____

16 On October 6, 2011, Plaintiff Dante Shon Gordon, who was then confined in the

17 Arizona State Prison, Cerbat Unit, in Kingman, Arizona,¹ filed a *pro se* Complaint pursuant

18 to 42 U.S.C. § 1983 with an Application to Proceed *In Forma Pauperis*. (Doc. 1, 3.) On

19 November 3, 2011, Plaintiff filed a notice of change of address reflecting that he had been

20 released. (Doc. 5.) In an Order filed on December 8, 2011, the Court denied Plaintiff's *in*

21 *forma pauperis* application and ordered Plaintiff to either pay the filing fee or show cause

22 why he was unable to do so. (Doc. 7.) Because Plaintiff submitted a one page statement that

23 was not signed under penalty of perjury and failed to provide specified information, the Court

24 granted Plaintiff an additional 30 days in which to do so. (Doc. 10.) On March 27, 2012,

25 Plaintiff provided the requested information and was granted leave to proceed *in forma*

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27 ¹ The Arizona State Prison was operated by Management and Training Corporation

28 (MTC) for the Arizona Department of Corrections (ADC).

1 *pauperis*. (Doc. 11, 12.) The case was then reassigned to the undersigned. (Doc. 13.)
 2 Because Plaintiff was a prisoner within the meaning of the Prison Litigation Reform Act
 3 (PLRA) when he commenced this case, this case is subject to the PLRA. The Court will
 4 order Defendant Polland to answer Count I of the Complaint and will dismiss the remaining
 5 claims and Defendants without prejudice.

6 **I. Statutory Screening of Prisoner Complaints**

7 The Court is required to screen complaints brought by prisoners seeking relief against
 8 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
 9 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
 10 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
 11 be granted, or that seek monetary relief from a defendant who is immune from such relief.
 12 28 U.S.C. § 1915A(b)(1), (2).

13 A pleading must contain a “short and plain statement of the claim *showing* that the
 14 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
 15 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
 16 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
 17 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
 18 statements, do not suffice.” Id.

19 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 20 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
 21 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 22 that allows the court to draw the reasonable inference that the defendant is liable for the
 23 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
 24 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 25 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
 26 allegations may be consistent with a constitutional claim, a court must assess whether there
 27 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

1 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 2 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
 3 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
 4 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
 5 94 (2007) (*per curiam*)).

6 **III. Complaint**

7 Plaintiff alleges three counts for threat to safety or failure to protect and violation of
 8 equal protection. He sues the Director of the Arizona Department of Corrections (ADC),
 9 Charles Ryan. He also sues Cerbat Complex Administrator Darla Elliott and Cerbat
 10 Assistant Deputy Warden Robert Polland. Plaintiff seeks injunctive, compensatory, and
 11 punitive relief.

12 Plaintiff alleges the following facts in his Complaint: On May 31, 2010, Plaintiff was
 13 one of 25 African-American inmates in the North Yard of the Cerbat Unit in front of
 14 Dormitory 1. Plaintiff and the other African-American inmates were attacked by 80 to 100
 15 White inmates. Four MTC officers in full riot gear stood by and watched after Polland
 16 ordered them to not intervene to stop the attacks. Plaintiff was seriously injured and he
 17 contends that the rioting inmates were not disciplined.

18 In a July 2, 2010 letter to Shelby Muhammad, Plaintiff’s mother, Complex
 19 Administrator Darla Elliott denied Muhammad’s request for a full report on the incident.
 20 Elliott maintained that prison staff had acted appropriately, which Plaintiff contends was an
 21 attempt to hide the truth. He also contends that contrary to Elliott’s statement in the letter,
 22 he did not receive a neurological examination until more than a month after the incident.

23 **IV. Failure to State a Claim**

24 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
 25 conduct about which he complains was committed by a person acting under the color of state
 26 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
 27 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). A “‘plaintiff generally must assert his own
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1 legal rights and interests, and cannot assert the legal rights or interests of third parties.’’
 2 Mothershed v. Justices of the Supreme Court, 410 F.3d 602, 610 (9th Cir. 2005) (quoting
 3 Warth v. Seldin, 422 U.S. 490, 499 (1975)). In addition, to state a valid constitutional claim,
 4 a plaintiff must allege that he suffered a specific injury as a result of the conduct of a
 5 particular defendant and he must allege an affirmative link between the injury and the
 6 conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

7 **A. Ryan**

8 Plaintiff sues Director Ryan. Although Ryan may properly be sued, Plaintiff fails to
 9 state a claim against him.

10 To state a claim against a defendant, “[a] plaintiff must allege facts, not simply
 11 conclusions, that show that an individual was personally involved in the deprivation of his
 12 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual
 13 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of
 14 a policy, practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188
 15 (9th Cir. 2001). Further, there is no *respondeat superior* liability under § 1983, so a
 16 defendant’s position as the supervisor of someone who allegedly violated a plaintiff’s
 17 constitutional rights does not make him liable. Monell v. Dep’t of Soc. Servs., 436 U.S. 658,
 18 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his
 19 individual capacity, “is only liable for constitutional violations of his subordinates if the
 20 supervisor participated in or directed the violations, or knew of the violations and failed to
 21 act to prevent them.” Taylor, 880 F.2d at 1045. In addition, where a defendant’s only
 22 involvement in allegedly unconstitutional conduct is the denial of administrative grievances,
 23 the failure to intervene on a prisoner’s behalf to remedy the alleged unconstitutional behavior
 24 does not amount to active unconstitutional behavior for purposes of § 1983. Shehee v.
 25 Luttrell, 199 F.3d 295, 300 (6th Cir. 1999); accord Mintun v. Blades, No. CV-06-139, 2008
 26 WL 711636, at *7 (D. Idaho Mar. 14, 2008); Stocker v. Warden, No. 1:07-CV-00589, 2009
 27 WL 981323, at *10 (E.D. Cal. Apr. 13, 2009).

1 Plaintiff asserts that Ryan is liable as the director of ADC for application of ADC
 2 policies by MTC. He further contends that Ryan is responsible for the health and safety of
 3 inmates incarcerated by or for ADC. Plaintiff predicates liability against Ryan on *respondeat*
 4 *superior*. As noted above, *respondeat superior* is not a basis for liability under § 1983.
 5 Plaintiff does not otherwise allege facts to support that Ryan was directly involved in any
 6 constitutional violation or facts to support that Plaintiff's constitutional rights were violated
 7 pursuant to a policy, custom, or practice promulgated or endorsed by Ryan. Accordingly,
 8 Plaintiff fails to state a claim against Ryan and he will be dismissed.

9 **B. Elliott**

10 Plaintiff also sues Complex Administrator Elliot for her response to a letter sent by
 11 his mother. Neither the refusal to provide a report of an incident, nor alleged mis-
 12 characterization of the incident in response to a letter, rise to the level of a constitutional
 13 violation. Accordingly, Plaintiff fails to state a claim against Elliott and she and Count II
 14 will be dismissed.

15 **C. Count III**

16 In Count III, Plaintiff alleges that the White instigators of the racial attack on him
 17 were not punished or disciplined. The Equal Protection Clause of the Fourteenth
 18 Amendment provides that a state may not "deny to any person within its jurisdiction the
 19 equal protection of the laws," which is essentially a direction that all persons similarly
 20 situated should be treated alike. U.S. Const., amend. XIV; see City of Cleburne v. Cleburne
 21 Living Ctr., Inc., 473 U.S. 432, 439 (1985). A state practice that interferes with a
 22 fundamental right or that discriminates against a suspect class of individuals is subject to
 23 strict scrutiny. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976); see City of
 24 Cleburne, 473 U.S. at 441. Absent allegations that he is a member of a suspect class, or that
 25 a fundamental right has been violated, a plaintiff must allege facts to support that he has been
 26 intentionally treated differently from others who are similarly situated without a reasonable
 27 basis therefor. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Conclusory
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allegations do not suffice. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

Plaintiff alleges that White inmates who instigated or participated in assaulting him were not disciplined. Plaintiff's allegations are conclusory. He does not allege facts to support that he ordinarily would be informed if discipline were imposed or by whom. Further, he does not allege facts to support that the White inmates were treated differently than non-White inmates with respect to discipline in connection with this incident based on their race. Finally, Plaintiff fails to link any Defendant to this claimed constitutional violation. For all of these reasons, he fails to state a claim in Count III.

V. Claim for Which an Answer Will be Required

In Count I, Plaintiff alleges that Defendant Polland ordered officers in full riot gear not to intercede to stop violent assaults on African American inmates by White inmates. Plaintiff alleges that he was seriously injured as a consequence. Plaintiff sufficiently states a claim for failure to protect against Polland.

VI. Warnings

A. Release

Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release. Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result in dismissal of this action.

B. Address Changes

Plaintiff must file and serve a notice of a change of address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other relief with a notice of change of address. Failure to comply may result in dismissal of this action.

C. Copies

Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy

of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice to Plaintiff.

D. Possible Dismissal

If Plaintiff fails to timely comply with every provision of this Order, including these warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to comply with any order of the Court).

IT IS ORDERED:

(1) Counts II and III and Defendants Ryan and Elliott are **dismissed** without prejudice.

(2) Defendant Polland must answer Count I.

(3) The Clerk of Court must send Plaintiff a service packet including the Complaint (Doc. 1), this Order, and both summons and request for waiver forms for Defendant Polland.

(4) Plaintiff must complete² and return the service packet to the Clerk of Court within 21 days of the date of filing of this Order. The United States Marshal will not provide service of process if Plaintiff fails to comply with this Order.

(5) If Plaintiff does not either obtain a waiver of service of the summons or complete service of the Summons and Complaint on a Defendant within 120 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(i).

² If a Defendant is an officer or employee of the Arizona Department of Corrections, Plaintiff must list the address of the specific institution where the officer or employee works. Service cannot be effected on an officer or employee at the Central Office of the Arizona Department of Corrections unless the officer or employee works there.

1 (6) The United States Marshal must retain the Summons, a copy of the Complaint,
2 and a copy of this Order for future use.

3 (7) The United States Marshal must notify Defendants of the commencement of
4 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
5 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The**
6 **Marshal must immediately file signed waivers of service of the summons. If a waiver**
7 **of service of summons is returned as undeliverable or is not returned by a Defendant**
8 **within 30 days from the date the request for waiver was sent by the Marshal, the**
9 **Marshal must:**

10 (a) personally serve copies of the Summons, Complaint, and this Order upon
11 Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

12 (b) within 10 days after personal service is effected, file the return of service
13 for Defendant, along with evidence of the attempt to secure a waiver of service of the
14 summons and of the costs subsequently incurred in effecting service upon Defendant.
15 The costs of service must be enumerated on the return of service form (USM-285) and
16 must include the costs incurred by the Marshal for photocopying additional copies of
17 the Summons, Complaint, or this Order and for preparing new process receipt and
18 return forms (USM-285), if required. Costs of service will be taxed against the
19 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
20 Procedure, unless otherwise ordered by the Court.

21 (8) **A Defendant who agrees to waive service of the Summons and Complaint**
22 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**


23 (9) Defendant must answer the Complaint or otherwise respond by appropriate
24 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
25 Rules of Civil Procedure.

26 (10) Any answer or response must state the specific Defendant by name on whose
27 behalf it is filed. The Court may strike any answer, response, or other motion or paper that

1 does not identify the specific Defendant by name on whose behalf it is filed.

2 (12) This matter is referred to Magistrate Judge James F. Metcalf pursuant to Rules
3 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
4 under 28 U.S.C. § 636(b)(1).

5 DATED this 26th day of April, 2012.

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9 Robert C. Broomfield
Senior United States District Judge